IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. THOMAS E. LUDVIGSEN, Appellant.	No. 37548-6-II UNPUBLISHED OPINION

Van Deren, C.J.—Thomas Ludvigsen appeals his conviction for first degree possession of stolen property. He argues that there was insufficient evidence to show that he had actual or constructive possession of the property, or that he had knowledge the property was stolen. He also argues that the trial court erred in calculating his offender score as 10 because one of his prior convictions had washed out and because the trial court did not make a finding that he was on community custody at the time of the current offense. We affirm his conviction but remand for resentencing.

FACTS

On November 15, 2006, the Aberdeen Police Department received a report of a stolen Honda Accord from the Aberdeen Honda dealership. Aberdeen police contacted the neighboring

Hoquiam police, who received a tip that led them to 360 Lawrence in Hoquiam. Hoquiam Police Officer Jeremy Mitchell and Detective Shane Krohn went to address in Hoquiam on December 7, 2006. Mitchell observed a Honda engine on an engine hoist, partially covered by a tarp. Mitchell also saw two Honda wheels in the porch area of the house. Klee Ann Lowdermilk answered the door and gave Mitchell permission to look at the engine. The vehicle identification number on the engine matched that of the stolen Honda.

Ludvigsen came out of the house and Mitchell asked him about the engine. Ludvigsen "said he didn't know it was there, didn't know it was stolen, was just coming out to see what was going on." Report of Proceedings (RP) at 34. Ludvigsen went back into the house but then came out later and told Mitchell, "[H]e didn't want Klee Ann to be in trouble." RP at 35. He said "that Jeremy Butts had dropped off that motor a couple days prior" and again told Mitchell "he didn't notice [the engine] was stolen." RP at 40.

Krohn observed an engine partially covered by a tarp "hanging from the engine hoist." RP at 43. Krohn also observed a spare tire, coils, shocks, and "a few other miscellaneous parts that appeared to be brand new." RP at 47. Krohn testified that there were several vehicles on the property. Two of these vehicles "didn't look like they were actually being used, like maybe they were broken down. . . . They were older, older vehicles." RP at 43-44. None of the vehicles on the property "matched that type of [Honda] engine." RP at 44. He took photographs of the engine, noting "how clean the engine was, no dirt or grease on it." RP at 46-47. He also observed that the wheel axles were still attached to the engine, which he had not seen before and which he thought was "kind of strange." RP at 47. On March 12, 2007, the State charged Ludvigsen with first degree possession of stolen property.

At trial, Aberdeen Police Detective Sergeant Warden Charles Joseph Chastian testified that he received a report on November 20, 2006, that a vehicle had been stolen from the Aberdeen Honda. Terry Glick, former owner of Aberdeen Honda, reported the theft. She estimated the value of the vehicle's engine as between $10,000 and $15,000. Glick stated that Honda does not sell engines separately in the way this engine was found.

The jury found Ludvigsen guilty of first degree possession of stolen property. At sentencing, the trial court calculated Ludvigsen's offender score as 10. Ludvigsen agreed with the State's recommended sentencing range and the trial court sentenced him to 57 months in prison.

Ludvigsen appeals.

ANALYSIS

I. Sufficiency of the Evidence

Ludvigsen argues that "[t]he State did not prove beyond a reasonable doubt that [he] knowingly possessed stolen property." Br. of Appellant at 5 (emphasis omitted). He argues that the State did not prove that he was in actual or constructive possession of the stolen engine and tires because it did not show that he had "dominion and control" over them. Br. of Appellant at 9. Further, he argues that the State failed to prove that he had knowledge that the parts were stolen.

A. Standard of Review

We review a challenge to the sufficiency of the evidence by "view[ing] the evidence in the light most favorable to the State and determin[ing] whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt." *State v. Brown*, 162 Wn.2d

422, 428, 173 P.3d 245 (2007). "'All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.'" *Brown*, 162 Wn.2d at 428 (quoting *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006)). "'A claim of insufficiency admits the truth of the State's evidence.'" *Brown*, 162 Wn.2d at 428 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

"Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient." *State v. O'Neal*, 159 Wn.2d 500, 506, 150 P.3d 1121 (2007). In reviewing the evidence, we defer to the trier of fact regarding conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To convict Ludvigsen of first degree possession of stolen property in this case, the State had to prove beyond a reasonable doubt:

> (1) That on or about December 7, 2006, [Ludvigsen] knowingly received, retained, possessed, concealed or disposed of stolen property;
> (2) That [he] acted with knowledge that the property had been stolen;
> (3) That [he] withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
> (4) That the stolen property exceeded $1500 in value; and
> (5) That the acts occurred in Grays Harbor County, Washington.

Clerk's Papers (CP) at 8.

B. Possession

"Possession of property may be either actual or constructive." *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession occurs when the goods are in the personal custody of the person charged. A person has constructive possession when the goods—or the premises containing the goods—are within the person's "dominion and control."

Callahan, 77 Wn.2d at 29. To determine whether a person has constructive possession, we must examine the "totality of the situation" to ascertain if substantial evidence exists from which the trier of fact could have reasonably inferred that the defendant had dominion and control over the item. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977) (emphasis omitted). Part of dominion and control is the defendant's ability to reduce the property immediately to actual possession. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

Proximity to the property is not enough to establish constructive possession; but, proximity, coupled with other circumstances from which the trier of fact could infer dominion and control, is sufficient. *Jones*, 146 Wn.2d at 333; *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). "The fact of temporary residence, personal possessions on the premises, or knowledge of the presence of the [item] without more is insufficient to show dominion and control necessary to establish constructive possession." *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983). But "exclusive control is not necessary to establish constructive possession." *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004).

Ludvigsen relies on *State v. McCaughey*, 14 Wn. App. 326, 541 P.2d 998 (1975) to support his argument that the State's evidence of possession of the engine and parts was insufficient to support his conviction. In *McCaughey*, the defendant and another man, Michael Orson, were found sleeping near a station wagon along the side of Interstate 5. Police discovered that the license plates on the station wagon belonged to another vehicle and arrested the men. Upon inventorying the vehicle, the police questioned the men about stereo equipment in the car. Orson answered the questions; McCaughey only nodded agreement to Orson's answers. The police later discovered that the stereo equipment was stolen. *McCaughey*, 14 Wn. App. at 327.

On appeal from his conviction for possession of stolen merchandise, we held that McCaughey's "statements" combined with his proximity to the station wagon were only sufficient to show McCaughey had knowledge that the items were stolen, but held it "illogical to extrapolate the inferred fact of defendant's knowledge into the inferential conclusion of defendant's possession." *McCaughey*, 14 Wn. App. at 329.

Unlike in *McCaughey*, here, there was additional evidence beyond Ludvigsen's proximity to the property that supported a finding of his constructive possession of the engine and parts. First, Ludvigsen originally denied any knowledge of the engine but shortly thereafter admitted knowing who left the engine and parts on the property and when they were left. He also volunteered to police that he did not want Lowdermilk to be in trouble. Though we acknowledge that this evidence is circumstantial, circumstantial evidence may be sufficient evidence of possession of stolen property, *O'Neal*, 159 Wn.2d at 506, and we defer to the trier of fact's determinations on the persuasiveness of the evidence. *Walton*, 64 Wn. App. at 415-16.

Based on the evidence, a rational jury could have found that Ludvigsen had constructive possession of the stolen Honda parts. Therefore, we hold that there was sufficient evidence to convict Ludvigsen of first degree possession of stolen property and affirm the conviction.

C. Knowledge

RCW 9A.08.010(1)(b) (emphasis omitted) defines "knowledge" as follows:

> A person knows or acts knowingly or with knowledge when:
>
> (i) he is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or
>
> (ii) he has information which would lead a reasonable man in the same situation to believe that facts exist which facts are described by a statute defining an offense.

In this case, a rational juror could find Ludvigsen had knowledge under two circumstances: (1) if he acted knowingly even if he did not know his actions constituted a crime or (2) he had "information which would lead a reasonable person in the same situation" to understand that his

actions were a criminal.[1] CP at 9. Further, "although possession alone is not sufficient to prove guilty knowledge, possession together with slight corroborating evidence of knowledge may be sufficient." *State v. Scoby*, 117 Wn.2d 55, 61-62, 810 P.2d 1358, 815 P.2d 1362 (1991).

Because we hold that Ludvigsen had constructive possession of the property, the jury need only have found "slight corroborating evidence of knowledge" to show that Ludvigsen knew the property was stolen. *Scoby*, 117 Wn.2d at 61-62. Here, the State presented evidence that (1) the parts were clean and looked new; (2) the engine was covered by a tarp, concealing it; (3) the engine was still connected to the wheel axles; (4) Ludvigsen knew the engine was on the property and knew who had brought the engine to the property; and (5) Ludvigsen interjected himself into Mitchell's contact with Lowdermilk and stated that he did not want Lowdermilk to be in trouble.

The State presented sufficient corroborating evidence that Ludvigsen knew the property was stolen. Accordingly, we hold that a rational jury could have found that Ludvigsen had knowledge that the parts were stolen.

Because there was sufficient evidence to support Ludvigsen's first degree possession of stolen property conviction, we affirm.

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[1] Jury instruction 9 states:

> A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.
>
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

CP at 9.

II. Offender Score

A. Standard of Review

"We review a sentencing court's calculation of an offender score de novo." *State v. Bergstrom*, 162 Wn.2d 87, 92, 169 P.3d 816 (2007). "[I]llegal or erroneous sentences may be challenged for the first time on appeal." *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). Where a defendant did not raise a specific objection at sentencing, the State may present additional evidence upon remand for resentencing. *State v. Mendoza*, 165 Wn.2d 913, 930, 205 P.3d 113 (2009).

B. 1982 Conviction Washed Out

Ludvigsen argues that the trial court erred in calculating his offender score as 10 because the 1982 conviction listed in his criminal history should not have been included. He argues, citing former RCW 9.94A.525(2) (2006), that the 1982 conviction should have washed out because he was crime-free for five years after his release.[2]

The State agrees with Ludvigsen that the 1982 conviction washed out. It argues that "the 1982 conviction was included in the criminal history[but] was not included in calculating the Offender Score." Br. of Resp't at 12. It argues that the trial court properly calculated Ludvigsen's offender score as 10 because Ludvigsen had 9 convictions, placing his offender score

[2] Former RCW 9.94A.525(2), in effect at the time Ludvigsen committed the current offense, *see* RCW 9.94A.345, stated in pertinent part:

> [C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

This portion now exists at RCW 9.94A.525(2)(c).

at 9, and was on community custody at the time of the charged offense, thus, adding one point.

Based upon our own review of the existing record, we accept the State's concession that the 1982 conviction should not be included in the offender score. According to Ludvigsen's judgment and sentence, Ludvigsen was convicted in 1982 and not again until 1989.[3] Further, as Ludvigsen notes in his brief, we previously held that Ludvigsen's 1982 conviction washed out. *See State v. Ludvigsen*, noted at 114 Wn. App. 1045, 2002 WL 31630856, at *3.

C. Community Custody

Despite the wash out of Ludvigsen's 1982 conviction, the State argues that Ludvigsen's offender score was properly calculated as 10. The State notes that, "[a]s set forth in the Statement of Prosecutor, Ludvigsen was on Community Custody at the time he committed the offense." Br. of Resp't at 12. It points to RCW 9.94A.525(19), which states, "If the present conviction is for an offense committed while the offender was under community custody, add one point."[4] Br. of Resp't at 12.

In his reply brief, Ludvigsen argues that "[t]he Judgment and Sentence . . . does not include a judicial finding that [he] was on community custody, and the court did not make such a finding at the sentencing hearing." Reply Br. of Appellant at 8. He argues that community custody status is a factual determination that must be made by the sentencing court and that "his case should be remanded to correct his offender score" because the sentencing court made no such finding. Reply Br. of Appellant at 8-9.

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[3] Ludvigsen was sentenced to 9 months confinement for the 1982 conviction. *See State v. Ludvigsen*, noted at 114 Wn. App. 1045, 2002 WL 31630856, at *2.

[4] At the time Ludvigsen committed the current offense, this portion appeared at subsection (18). *See* former RCW 9.94A.525(18) (2006).

It is not clear from the appellate record what documents, if any, the trial court reviewed in determining Ludvigsen's offender score. The criminal history contained in the judgment and sentence lists 10 offenses, including Ludvigsen's 1982 washed out conviction. His community custody status is not mentioned in his judgment and sentence and no discussion regarding community custody occurred at sentencing.[5] The record on appeal contains no evidence of the prior convictions or Ludvigsen's community custody status beyond the prosecutor's statement.

Due process "require[s] that a sentencing court base its decision on information bearing 'some minimal indicium of reliability beyond mere allegation.'" *Mendoza*, 165 Wn.2d at 920 (internal quotation marks omitted) (emphasis omitted) (quoting *Ford*, 137 Wn.2d at 481). "If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record." RCW 9.94A.500(1).

"[T]he State must provide evidence of a defendant's criminal history, generally a certified copy of the judgment and sentence, unless the defendant affirmatively acknowledges the criminal history on the record." *Mendoza*, 165 Wn.2d at 930. If a defendant affirmatively acknowledges his criminal history, he "thereby obviate[s] the need for the State to produce evidence." *Mendoza*, 165 Wn.2d at 920. But the Washington Supreme Court held in *Mendoza* that a defendant does not affirmatively acknowledge his criminal history by: (1) agreeing with the sentencing range recommended by the State or (2) failing to object to the statement of the prosecutor.[6] *Mendoza*, 165 Wn.2d at 925-26.

[5] The only document contained in the record on appeal addressing the issue of community custody is the statement of the prosecuting attorney.

[6] The court held that a prosecutor's statement does not constitute a "presentencing report" and therefore did not fall under RCW 9.94A.530(2), *Mendoza*, 165 Wn.2d at 921-25, which states

Therefore, Ludvigsen's failure to object to the prosecutor's statement that he was on community custody at the time this crime was committed does not constitute an acknowledgment of his community custody status. Because Ludvigsen did not affirmatively acknowledge his offender score or his community custody status, the State was required to produce evidence of the convictions and his community custody status and the trial court was required to articulate on the record the bases for the calculation of Ludvigsen's offender score. *Mendoza*, 165 Wn.2d at 921; former RCW 9.94A.500(1) (2006).

We note that Ludvigsen's sentence for this conviction likely will not change upon remand. Under RCW 9.94A.510, the maximum offender score category for purposes of calculating sentencing ranges is "9 or more." For crimes with a seriousness level of II, as here, the sentencing range for defendants with an offender score of 9 or more is 43 to 57 months. Therefore, even if the sentencing court improperly added one point to Ludvigsen's offender score, making the score 10 instead of 9, the error was harmless. *See State v. Gonzales*, 90 Wn. App. 852, 855, 954 P.2d 360 (1998); *State v. Argo*, 81 Wn. App. 552, 569, 915 P.2d 1103 (1996).

But we read *Mendoza* to require that the State must always "provide evidence of a defendant's criminal history [where] the defendant[has not] affirmatively acknowledge[d]" the criminal history on the record. *Mendoza*, 165 Wn.2d at 930. Ludvigsen did not affirmatively acknowledge the offender score and, therefore, the State was required to provide evidence to support the offender score calculation. Because Ludvigsen did not object to the offender score calculation at sentencing nor did he affirmatively agree to it, we remand for resentencing, allowing the State to provide evidence of Ludvigsen's prior convictions and his community custody status

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that "[a]cknowledgment includes not objecting to information stated in the presentence reports."

on the record.[7] *See Mendoza*, 165 Wn.2d at 930; *State v. Lopez*, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002); *Ford*, 137 Wn.2d at 485-86; *State v. McCorkle*, 88 Wn. App. 485, 500, 945 P.2d 736 (1997).

We affirm Ludvigsen's conviction but remand for resentencing.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, C. J.

We concur:

Bridgewater, J .

Penoyar, J.

[7] In 2008, the Washington State legislature amended RCW 9.94A.530(2) by adding the following language: "On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented." This amendment extends the requirement articulated in *Lopez*, *Ford*, and *State v. McCorkle*, 88 Wn. App. 485, 500, 945 P.2d 736 (1997) that the State may present additional evidence on remand for resentencing, to include cases where a defendant did object at sentencing. The amended statute is inapplicable here, since Ludvigsen committed the current offense prior to the statute's enactment. RCW 9.94A.345. But because Ludvigsen did not object at sentencing, the State may present additional evidence of his prior convictions and his community custody status upon remand, under *Lopez*, *Ford*, and *McCorkle*. *See Lopez*, 147 Wn.2d at 520-21; *Ford*, 137 Wn.2d at 485-86; *McCorkle*, 88 Wn. App. at 500; *see also Mendoza*, 165 Wn.2d at 930.